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INTRODUCTION: POLITICAL RISK AND PUBLIC LAW

Adrian Vermeule¹

On December 15–16, 2011, Harvard Law School convened a conference on “Political Risk and Public Law”. This special issue of the *Journal of Legal Analysis* is devoted to publishing papers on this topic by Jon Elster, Edward Glaeser, Eric Posner, Fred Schauer, Mark Tushnet, and myself. The overall aim is to introduce a new set of questions about public law and a new analytical framework for thinking about those questions.

The premise of the enterprise is that constitutions and other instruments of public law may fruitfully be viewed as devices for regulating political risks. Large literatures in law, economics, political science, and policy studies examine *first-order risks* that arise from technology, the market, or nature. Product safety laws, workplace safety laws, health and medical regulation, environmental regulation, emergency management, and other categories of regulatory and administrative policy-making attempt to manage such risks so as to promote overall welfare, fair distribution of risk, and other goals. By contrast, it may be fruitful to understand constitutions and foundational statutes, such as the Administrative Procedure Act, as devices for regulating *second-order risks*. These are risks that arise from the design of institutions, the allocation of legal and political power among given institutions, and the selection of officials to staff those institutions. Whereas ordinary risk regulation asks how first-order risks should be managed, political risk regulation asks how institutions should be designed, how competences should be allocated, and how officials should be selected to produce the best attainable constitutional system.

The difference between the political risk perspective on public law, on the one hand, and the familiar legal-process analysis of comparative institutional competence, on the other, is that the former employs the framework of risk analysis elaborated by many disciplines across the social and policy sciences. That framework promises new insights for public law. Constitutional actors have

1 Harvard Law School, John H. Watson Professor of Law, Harvard Law School. E-mail: avermeule@law.harvard.edu. Thanks to the editors of the *Journal of Legal Analysis*, Mark Ramseyer and Steve Shavell, for arranging this special issue, and to Jacob Gersen for comments. Parts of the foregoing are adapted from, and treated more extensively in, Adrian Vermeule, “Precautionary Principles in Constitutional Law”, in this issue.

often spoken the prose of risk regulation without knowing it, offering arguments about constitutional and institutional design that implicitly posit second-order risks and offer institutional prescriptions for managing those risks. By bringing the analytic structure of those arguments to the surface, political risk analysis promises to allow a more intelligent description and evaluation of the major problems of public law.

The category of second-order risks is capacious, and the political risks that principally concern constitutional rulemakers and other actors change over time. In literatures of development economics, contract law and (to some extent) constitutional law, one standard sense of “political risk” is narrow: parties who contract with a government to buy sovereign debt, or who engage in commercial ventures within a government’s territory, face the risk that the government will breach its contracts or expropriate investments. Eric Posner’s paper explains this sense of political risk and examines contractual mechanisms that parties and governments use to manage such risks. However, both constitutional actors and analysts have often discussed a broader set of political risks as well. In the founding era in the USA, the most prominent political risks posited by Antifederalists involved tyranny, oligarchy or aristocracy, excessive centralization, and other threats to public liberty. By contrast, Federalists, especially Publius, focused on the risks of military weakness from excessive decentralization, the instability of unconstrained popular democracy, and the insecurity of property rights.

In this vein, the conference participants examined a broad range of political risks. Jon Elster’s paper examines the role of violence and the risk or threat of violence in the two leading episodes of constitution-making in the late 18th century, at Philadelphia and at Paris. In the American case, Elster emphasizes that the risk of armed popular rebellions, such as Shay’s Rebellion, hovered over the convention and structured some of its most critical decisions—decisions criticized in turn by Jefferson on the ground that the draft constitution “set[] up a kite [a hawk] to keep the hen-yard in order”, (this issue, at—) and thereby created a risk of elite oppression. Edward Glaeser’s paper, an extension of the public choice literature on the political determinants and consequences of regulation, focuses on a tradeoff between “the twin political risks of subversion, where private companies capture policy” and “political favoritism, where public leaders use government policy to pursue their own pet objectives” (this issue, at —). Glaeser examines this tradeoff in the setting of three main classes of market failure—monopoly, externalities, and problems of systemic risk in the financial sector—and details conditions under which laissez-faire private ownership, regulated private ownership, or public ownership will maximize welfare, given competing risks of political distortions. Fred Schauer’s paper examines the political risks of breaking the law, taking the standpoint

of officials whose policy preferences are inconsistent (or have some risk of being inconsistent) with what the law requires or may require. Here there are multiple political risks, including risks of lawsuits or criminal action against officials, and the risk that where there are no legal sanctions for official lawbreaking, officials will be able to break the law with impunity so long as their actions are politically popular *ex post*. Mark Tushnet's paper addresses free speech doctrine, much of which focuses on the risk that officials will suppress political dissent or other potentially valuable speech. Like Glaeser, Tushnet observes that law and regulation in the relevant domain are complicated by systematic tradeoffs. As against the political risk of illicit speech suppression by governments, judicial review of free speech claims creates political risks of its own, notably the risk that judges will develop excessively rigid rules and thereby invalidate justifiable regulation of speech.

The tradeoffs central to these papers illustrate that one of the central debates in the theory of first-order risk regulation has a structural analogue in the history and theory of constitutional design. The debate involves the utility of "precautionary principles" in the regulation of health, safety, and environmental risks. Precautionary principles come in many varieties, and are notoriously slippery, but the common theme is roughly that law and regulatory policy should create safeguards that attempt to ward off risks or uncertain harms before they materialize, and should set the burden of proof against risky technologies, products, or actions (Wiener 2002). Critics of precautionary principles have argued that risks may lie on all sides of the issues, so that precautions may perversely exacerbate the targeted risk or produce collateral risks; where this is so, precautionary principles may prove self-defeating (*see, e.g.*, Sunstein 2005; Wiener 2002).

Structurally parallel debates are central to the theory of constitutional design. In the American case, for example, Antifederalists worried about the risk that standing armies would eventuate in some form of monarchical despotism or tyranny, and thus proposed stringent constitutional precautions.² In rebuttal, Hamilton (writing as Publius) argued that overly stringent precautions against standing armies at the national level would risk foreign invasion and domestic rebellion, possibly leading to greater threats to liberty and property overall—a perverse consequence of precautions.³ The papers by Elster, Glaeser, Schauer, and Tushnet illustrate, in different ways, the major theme of Hamilton's rebuttal and of the modern critiques of precautionary principles: political risks can lie on all sides of alternative institutional arrangements.

2 See the Antifederalist pamphlets collected in Storing (1981).

3 *Federalist* No. 8, in Hamilton et al. (1961).

Another parallel involves the distinctions among risk, uncertainty and ignorance, a staple of the first-order literature. Technically speaking, in decisions under risk there is both a well-defined set of possible outcomes and probabilities that can be attached to those outcomes; in decisions under uncertainty, no probabilities can be attached to the possible outcomes; and in decisions under ignorance, even the range of possible outcomes is itself unknown or ill-defined. In a larger colloquial sense, however, “risk” can encompass any of these categories, and one of the major lines of discussion in the risk-regulation literature is whether to understand particular problems as decisions under risk, uncertainty, or ignorance.

The same issue surfaces repeatedly in constitutional design. Given the bewildering array of causal forces and institutional variables that constitutional rule-makers have to consider, and the general fog of uncertainty that hovers over politics conducted on a large scale, certainty is never attainable; the fighting questions are whether epistemically warranted probabilities can ever sensibly be attached to the outcomes of constitutional choices, and what the range of possible outcomes might be. In the founding-era debates, Elster reports, participants often attempted to justify constitutional precautions by appealing to the bare possibility of bad outcomes, without offering any estimate of the probability of those outcomes—essentially the conservative “maximin” strategy for decision-making under uncertainty (Luce & Raiffa 1957, 278–282). Other participants offered risk-based assessments that implicitly posited probability estimates, although not of course in modern terms.

In addition to the foregoing questions, which the papers illuminate but do not resolve, the lens of political risk implies a further research agenda for public law. Here are a few of the relevant questions:

(1) In the first-order risk regulation literature, another major discussion involves the question whether there are systematic cross-national differences in styles of or approaches to risk management. Very roughly, one position holds that European democracies are systematically more risk-averse and more precautionary than is the USA, whereas another position holds that different polities merely tend to focus on different risks on different margins of policy, so that no large-scale contrast is possible (Wiener 2010). At the level of second-order risks, are there systematic differences across polities? Do some constitutions reflect greater concern about private violence, disorder, or capture of governmental powers by powerful private actors, whereas some reflect greater concern about majoritarian oppression or official tyranny? Is there a cross-national contrast between robust free speech protection in the USA and weaker protection in Europe?

(2) Relatedly, what is the role, if any, of “cultural cognition” about second-order political risk? A burgeoning literature on cultural risk cognition

holds that, as to various first-order risks, there are several identifiable cultural styles of risk perception and evaluation, including “hierarchical”, “egalitarian”, and “communitarian” styles (Kahan & Braman 2006). Conditional on believing that this literature illuminates first-order risk regulation, can it usefully be transposed to the setting of second-order political risks? Are there important cultural determinants of anxiety about political risks? It has been claimed, for example, that American political culture repeatedly undergoes bouts of “tyrannophobia” or widespread public anxiety about the risk of despotism (Posner & Vermeule 2012); it is also sometimes said that American political culture is prone to conspiracy theorizing and a “paranoid political style” that tends to exaggerate political risks of various sorts (Hofstadter 1964). Do these claims stand up, historically and theoretically? What do they imply for the design of constitutions, framework statutes, and other instruments of public law?

(3) Within any given polity, do different institutions or different types of rulemakers tend to take systematically different approaches to political risk regulation? Will rules designed by judges, for example, be systematically more or less precautionary about political risk than rules designed by legislators, executive officials, or independent regulatory agencies and tribunals?

(4) From a normative standpoint, how should institutional designers cope with conditions of risk, uncertainty, or ignorance? In situations of risk in the strict sense, in which probabilities can be attached to outcomes, are the tools of first-order cost–benefit analysis useful at the second order? In situations of genuine uncertainty or ignorance about political risk, what approach should institutional and constitutional designers take? It has been argued, for example, that in the USA today there is in some sense a real chance that the imperial presidency will eventuate in executive despotism or a military coup (Ackerman 2010). Can such risks be quantified, or the possible harms evaluated? How could such a claim be shown to be plausible or implausible?

(5) Perhaps the largest set of normative questions arises out of a contrast, in the history of constitutional and political theory, between two general approaches to second-order risk regulation. These two approaches might be called *precautionary constitutionalism* and *optimizing constitutionalism*.⁴ The former is exemplified by David Hume’s (1742) knavery principle: the maxim that “in contriving any system of government, and fixing the several checks and controls of the constitution, every man ought to be supposed a knave, and to have no other end, in all his actions, than private interest”. In more recent times, but in the same spirit, Karl Popper (1985) maintained that the central task of

4 For substantiation of this claim, see Vermeule, Adrian. 2012. Precautionary Principles in Constitutional Law, [this issue]; Lanni, Adriaan & Adrian Vermeule. Precautionary Constitutionalism in Ancient Athens, *Cardozo L. Rev.* (forthcoming).

democratic institutional design is to “organize political institutions [so] that bad or incompetent rulers can be prevented from doing too much damage . . .”. Under what conditions will this sort of precautionary constitutionalism prove attractive or unattractive? Is it even coherent, given that risks or uncertain harms may arise on all sides of the relevant questions of institutional design?

There is no shortage of such questions; this list is merely illustrative, not exhaustive. If constitutions and framework statutes can fruitfully be viewed as instruments for regulating political risks, then any of the problems, tools, and literatures relevant to ordinary risk regulation may have instructive analogies or disanalogies at the political level. The symposium papers are a first step towards exploring this larger agenda.

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